

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DANA MOURNING**

Claimant

VS.

**KOCH INDUSTRIES, INC.**

Self-Insured Respondent

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Docket No. 258,857

**ORDER**

Respondent requested review of the May 15, 2003 Award by Administrative Law Judge John D. Clark. The Board heard oral argument on November 4, 2003.

**APPEARANCES**

Dale V. Slape of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that if it is determined that the date of accident is the last day worked on November 8, 1999, the payment rate would be \$383 per week.

**ISSUES**

The Administrative Law Judge (ALJ) found that claimant suffered repetitive bilateral upper extremity injuries arising out of and in the course of her employment. As a result of the chronic pain from those injuries, the ALJ determined claimant is permanently and totally disabled.

The respondent requested review of whether the claimant's accidental injury arose out of and in the course of employment; the nature and extent of claimant's disability; and the date of accident, if any. Respondent argues the claimant has not met her burden of

proof that she suffered an accidental injury arising out of and in the course of employment because of the absence of any objective findings of injury and, therefore, benefits should be denied. If the claim is determined to be compensable, respondent argues the claimant would only be entitled to her 11 percent functional impairment since she is capable of returning to work with restrictions. Respondent concludes the claimant is not entitled to a work disability because she voluntarily terminated her accommodated position with respondent.

Conversely, claimant argues she suffered accidental injury each and every day at work through her last day worked on November 8, 1999. Although respondent provided work accommodations, claimant argues that she continued to suffer injury and a worsening of her condition through her last day worked. Accordingly, claimant argues the date of accident is November 8, 1999, and the payment rate in the award should be modified to \$383 per week. Finally, claimant notes both vocational experts as well as the majority of physicians concluded claimant is realistically and essentially unemployable. Consequently, claimant requests the Board to affirm the ALJ's determination that she is permanently and totally disabled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. The Board adopts those findings and conclusions as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

Respondent's contention that claimant did not suffer accidental injury arising out of and in the course of employment is premised on the argument that during her extended treatment for her bilateral upper extremity complaints there were no objective findings. This argument overlooks claimant's consistent complaints of pain as well as the treating physician's diagnosis of overuse tendinitis which he ultimately changed to chronic pain syndrome. And even respondent's medical expert, Dr. Chris D. Fevurly, ultimately concluded claimant had suffered a permanent functional impairment to her bilateral upper extremities as a result of her repetitive use injuries. Dr. Fevurly admitted that testing revealed claimant suffered a bilateral loss of grip strength and, in part, he based his rating upon that finding.

The Board affirms the ALJ's finding claimant met her burden of proof to establish that she suffered a series of repetitive injuries to her bilateral upper extremities arising out of and in the course of her employment with respondent.

The Board also agrees with and affirms the ALJ's finding that the claimant is permanently and totally disabled.

Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.<sup>1</sup>

An injured worker is permanently and totally disabled when rendered "essentially and realistically unemployable."<sup>2</sup> The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity.<sup>3</sup>

"The existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine."<sup>4</sup> It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>5</sup>

As the ALJ detailed in his award, Drs. Ralph E. Gay, Jane K. Drazek, and Pedro A. Murati concluded claimant was unable to engage in substantial and gainful employment. Vocational experts, Jerry D. Hardin and Karen C. Terrill, both agreed claimant was essentially and realistically unemployable. Although Dr. Fevurly arrived at a different conclusion, the Board finds the testimony of the other doctors and vocational experts as well as claimant's testimony regarding her inability to use her upper extremities without experiencing debilitating pain more persuasive. Consequently, the Board affirms the ALJ's finding that claimant is permanently and totally disabled.

The next issue for determination is the date of accident. The claimant alleged that she suffered accidental injury performing her repetitive work duties each and every working day through the last day worked on November 8, 1999.

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<sup>1</sup> K.S.A. 44-510c(a)(2).

<sup>2</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>3</sup> *Id.* at 112.

<sup>4</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

<sup>5</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

According to the principles set forth in *Treaster*,<sup>6</sup> the appropriate date of accident for this series of repetitive mini-traumas is the last day worked on November 8, 1999.

In *Treaster*, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,<sup>7</sup> in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

It is undisputed that respondent made a concerted effort to provide accommodations for claimant which included ergonomic adjustments as well as providing temporary employees to perform claimant's keyboarding activities. Nonetheless, claimant's uncontradicted testimony was that even with that assistance she still performed work-related activities with her upper extremities and those activities worsened her condition. Accordingly, the Board finds claimant suffered repetitive injuries through her last day worked on November 8, 1999, when she left work because of her injuries.

The maximum pay rate for the accident date of November 8, 1999, should be \$383 instead of the \$351 pay rate in the ALJ's Award. Consequently, the ALJ's Award is modified to reflect a pay rate of \$383 per week and is affirmed in all other respects.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated May 15, 2003, is modified to reflect a \$383 weekly payment rate and affirmed in all other respects.

The claimant is entitled to 9 weeks temporary total disability compensation at the rate of \$383 per week or \$3,447 followed by permanent total compensation at \$383 per week not to exceed \$125,000 for a permanent total general bodily disability.

As of November 21, 2003, there would be due and owing to the claimant 9 weeks temporary total disability compensation at \$383 per week in the sum of \$3,447 plus 201.71 weeks permanent total disability compensation at \$383 per week in the sum of \$77,254.93 for a total due and owing of \$80,701.93 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance of \$44,298.07 shall be paid at \$383 per week until fully paid or until further order of the Director.

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<sup>6</sup> *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

<sup>7</sup> *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director